KEET GERALD FRANCIS NOEL JOHN *a*

v.

MOHD NOOR @ HARUN BIN ABDULLAH & 2 ORS.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA *b*
DATO' SITI NORMA YAAKOB JCA
DATO' V.C. GEORGE JCA
[CIVIL APPEAL NO. T-02-106 OF 1994]
13 DECEMBER 1994

INJUNCTION: *Plaintiff obtaining ex-parte injunction - Application to set aside - Application allowed - Appeal against decision - Whether there were serious questions to be tried - Whether balance of convenience in favour of plaintiff or defendant - Whether damages provided for in agreement between parties adequate remedy - Principles to be applied in an application for interim injunctive relief.* *c*

INJUNCTION: *Trial Judge allowing application to set aside ex-parte injunction - Appeal against decision - Whether procedure adopted wrong in law - Whether plaintiff should have re-applied for the interim injunction - Whether interim injunction had since lapsed - Consideration of O. 29 r. 1(2B) Rules of the High Court 1980.* *d*

The first defendant's firm was awarded a licence to harvest timber from two parcels of land, known as compartment 408 and 412 respectively. Under the terms of a written agreement all the timber located on the two parcels was sold to the plaintiff. When the plaintiff came to harvest timber from compartment 408, he discovered that the parcel had been subjected to logging by neighbouring loggers. In the circumstances, the State Government replaced compartment 408 and awarded the firm a licence for a new parcel known as compartment 549. *e*

Upon the occurrence of a dispute, the plaintiff obtained an *ex-parte* injunction restraining the defendants from dealing with compartment 549 contrary to the terms of the written agreement. On an application to set aside the injunction, the learned Judge held that; *f*

(a) it was not within the contemplation of the parties that compartment 549 should form part of the transaction between the parties as recorded in the agreement and for that reason the plaintiff could claim no rights in respect of it;

(b) the plaintiff had no *locus standi* to sue the second and third defendants because they were not parties to the agreement; *g*

(c) the agreement was illegal and consequently there was no serious question to be tried;

(d) the balance of convenience was in favour of the defendant; and

(e) damages are an adequate remedy, the parties having provided for it in clause 14 of the agreement. *h*

On appeal, the Court reviewed some of the authorities on the subject and restated the relevant principles that apply to a case such as the present. The question also arose as to whether the decision in *Vethanayagam v. Karuppiah & Ors.* is good law.

Learned Counsel for the second and third defendants also contended that the procedure adopted by the appellant in appealing to reinstate the *ex-parte* injunction was wrong in *i*

law as by virtue of O. 29 r. 1(2B) Rules of the High Court 1980 (RHC 1980), that interim injunction has since lapsed. Counsel contended that the appellant should re-apply for the interim injunction.

Held:

[1] The correct approach to be adopted and the stages of reasoning involved in the process of arriving at the conclusion as to whether interlocutory injunctive relief should be granted or withheld are those that have been neatly summarised by Hashim Yeop A. Sani J., (as he then was) in *Mohamed Zainuddin v. Yap Chai Seng*.

[2] The correctness of the decision in *Vethanayagam* depends on the answer to the question whether the provisions in Chapter X of Part III of the Specific Relief Act 1950 (within which fall ss. 52 to 55) apply to both interlocutory and perpetual injunctions. The decisions in both *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* and *Bina Satu Sdn Bhd v. Tan Construction* answer the question in the negative. Both *Tan Soon Choo* and *Bina Satu* correctly state the law. It therefore follows that *Vethanayagam*, in so far as it conflicts with these two authorities, is bad law and should no longer be followed.

[3] A Judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

(a) firstly, he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried;

(b) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case;

(c) the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*.

[4] In the instant case, the question of substituting compartment 549 for 408 was not and could not have been within the contemplation of the parties when they entered into the agreement. At that point in time, the contracting parties must have proceeded on the basis that compartment 408 was available in its original state to be harvested. The problem about compartment 408 arose after the agreement had proceeded to implementation. That parties should stipulate for an unforseen event in advance of it is a *non sequitur*.

[5] The finding by the learned Judge that the plaintiff can claim no relief against the second and third defendants completely overlooks the plaintiff's case on this point, namely that these defendants are truly the alter ego of the first defendant. The plaintiff had produced sufficient evidence at the interlocutory stage to raise an inference that the second and third defendants were not exercising their independent judgment but were merely puppets controlled by the first defendant in all matters concerning the business and affairs of the firm.

[6] On the evidence before him the learned Judge should have held that the plaintiff's contention that the second and third defendants were the alter ego of the first defendant merited further investigation at the trial and for that reason amounted to a serious question to be tried. To ignore a serious submission based on evidence that is not inherently incredible or inherently improbable is a serious misdirection. In the circumstances the

learned Judge misdirected himself in dismissing out of hand a case mounted on *prima facie* evidence that supported this aspect of the plaintiff's case.

[7] The conclusion of the learned Judge that the agreement was not enforceable against the second and third defendants because they were not parties to it completely ignores the provisions of s. 26(b) of the Specific Relief Act 1950. The effect of that section is that the burden lies on him who asserts that he took the interest without notice of the prior contract.

[8] While the learned Judge was under no duty to make a positive finding that the second and third defendants had or had not discharged that burden, he should, nevertheless, have held that this was a matter to be resolved at the trial instead of brushing it aside. Whether the second and third defendants' assertion, that they were independent agents exercising their own judgment free from any control by the first defendant, was true, is a matter that has to be determined after their evidence has been tested by cross-examination. The summary disposal by the Judge of an issue of such importance is a serious miscarriage of justice.

[9] The learned Judge's finding that the agreement was illegal and that there was therefore no serious question to be tried is clearly contrary to the pronouncements in the cases of *Mohamed Zainuddin* and *SiRusa*, the latter being an authority plainly binding on him. The legality of the agreement is a serious question requiring mature consideration at the trial of the action and should not have been gone into in detail at the interlocutory stage as was done by the learned Judge.

[10] The Court could not agree with the submission of learned Counsel for the second and third defendants that whether there was a serious question to be tried was a matter within the discretion of the learned Judge and ought therefore not to be readily interfered with on appeal. The question as to whether there is a serious question to be tried depends upon an objective perception of the facts presented to a judicial arbiter and there is no element of discretion involved in the evaluation of those objective facts.

[11] While it is true that the learned Judge was correct in taking into account the practical realities of the situation, among which is the fact that workers would be laid-off and the risk that the concession would be lost through effluxion of time, he did not however sufficiently balance these with other relevant and competing considerations that weighed heavily in favour of the injunction being continued until the trial of the action.

[12] On the contention that damages were an adequate remedy, the learned Judge, by failing to consider the provisions of s. 19 of the Specific Relief Act 1950 and its possible application to the facts before him, had failed to take into account an important consideration. The learned Judge, by placing reliance wholly on clause 14 of the agreement, in order to exercise his discretion, took into account an irrelevant consideration.

Per Siti Norma Yaakob JCA:

[1] The *ex-parte* interim injunction was applied for and obtained by the appellant on 11 August 1994. The learned Judge, on an *inter parte* application, dissolved the interim injunction on 23 August 1994. Thus the hearings of the *inter parte* application were held and the judgment of the learned Judge was made within the 2 weeks period stipulated by O. 29 r. 1(2B) of the RHC 1980.

[2] The hearings on 22 & 23 August 1994, although interlocutory in nature, were hearings *inter parte* on the merits of the application as to whether the interim injunction

should continue to be maintained until the hearing of the main action itself or should be dissolved at the instance of the respondents. As such, there is no basis for the appellant to apply to the learned Judge for the reinstatement of the interim injunction.

[3] The interim injunction did not automatically lapse at the end of the two weeks period but was dissolved by an Order of Court made within two weeks of its grant. That Order of Court is an appealable order and this Court is empowered with the necessary jurisdiction under s. 67(1) of the Courts of Judicature Act 1964 to deal with it.

[Appeal allowed with costs. Appellant's interim injunction restored until trial of the action]

[**Bahasa Malaysia** Translation of Headnote]

***INJUNKSI**: Plaintif mendapatkan injunksi ex-parte - Permohonan untuk mengenepikan - Permohonan dibenarkan - Rayuan terhadap keputusan - Sama ada terdapat persoalan-persoalan serius untuk dibicarakan - Sama ada imbangan keselesaan memihak kepada plaintif atau defendan - Sama ada gantirugi yang diperuntukkan dalam perjanjian antara pihak-pihak merupakan remedi yang mencukupi - Prinsip-prinsip yang kena dipakai dalam satu permohonan untuk relief injunksi interim.*

***INJUNKSI**: Hakim perbicaraan membenarkan permohonan untuk mengenepikan injunksi ex-parte - Rayuan terhadap keputusan - Sama ada procedur yang diterima-pakai salah di sisi undang-undang - Sama ada plaintif seharusnya memohon semula untuk mendapatkan injunksi interim - Sama ada injunksi interim tersebut telah pun luput - Pertimbangan A. 29 k. 1(2B) Kaedah-Kaedah Mahkamah Tinggi 1980.*

Firma defendan pertama telah diberikan lesen untuk mengeluarkan kayu balak daripada dua bidang tanah, yang dikenali sebagai kompartmen 408 dan 412 masing-masingnya. Di bawah terma-terma satu perjanjian bertulis kesemua kayu balak yang terletak pada kedua-dua bidang tanah tersebut telah dijual kepada plaintif. Bilamana plaintif hendak mengeluarkan kayu balak daripada kompartmen 408, beliau mendapati bahawa bidang tersebut telah dicabul oleh pembalak-pembalak dari kawasan yang bersebelahan. Dalam keadaan yang sedemikian, Kerajaan Negeri telah menggantikan kompartmen 408 dan memberikan firma tersebut satu lesen untuk bidang baru yang dikenali sebagai kompartmen 549.

Setelah berlakunya satu pertikaian, plaintif telah mendapatkan satu *ex-parte* injunksi menghalang defendan-defendan daripada berurusan dengan kompartmen 549 bertentangan dengan terma-terma perjanjian bertulis tersebut.

Atas satu permohonan untuk mengenepikan injunksi tersebut, Tuan Hakim yang bijaksana telah memutuskan bahawa:

(a) ianya bukan merupakan hajat pihak-pihak tersebut bahawa kompartmen 549 seharusnya membentuk sebahagian daripada urusan antara pihak-pihak tersebut sepertimana yang direkodkan dalam perjanjian tersebut dan atas alasan tersebut plaintif tidak boleh menuntut apa-apa hak berhubung dengannya;

(b) plaintif tidak mempunyai *locus standi* untuk mendakwa defendan-defendan kedua dan ketiga kerana mereka tidak merupakan pihak-pihak kepada perjanjian tersebut;

(c) perjanjian tersebut adalah tak sah dan akibat daripada itu tidak terdapat persoalan yang serius untuk dibicarakan;

(d) imbangan keselesaan memihak kepada defendan; dan

(e) gantirugi merupakan satu remedi yang mencukupi oleh kerana, pihak-pihak tersebut telah memperuntukkannya dalam fasal 14 perjanjian tersebut.

Atas rayuan, Mahkamah telah mengkaji semula beberapa daripada autoriti-autoriti berhubung dengan hal perkara tersebut dan menyatakan semula prinsip-prinsip relevan yang terpakai pada satu kes sepertimana kes semasa ini. Persoalan juga timbul mengenai samada keputusan dalam *Vethanayagam lwn. Karuppiah & Ors.* adalah menurut undang-undang yang sempurna.

Peguam yang bijaksana bagi pihak defendan-defendan kedua dan ketiga juga menegaskan bahawa prosedur yang diterima-pakai oleh perayu dalam merayu untuk menghidupkan semula injunksi *ex-parte* tersebut adalah salah dalam sisi undang-undang sepertimana menurut A. 29 k. 1(2B) Kaedah-Kaedah Mahkamah Tinggi 1980, bahawa injunksi interim telah luput. Peguam menegaskan bahawa perayu tersebut seharusnya memohon semula untuk mendapatkan injunksi interim.

Diputuskan:

[1] Pendekatan yang betul yang diterima-pakai dan peringkat-peringkat alasan yang terlibat dalam proses mencapai keputusan tersebut iaitu sama ada relief injunksi interlokutori seharusnya diberikan atau ditahan adalah merupakan alasan yang telah diringkas dengan sempurnanya oleh Yang Arif Hashim Yeop A. Sani H. (beliau ketika itu) dalam kes *Mohamed Zainuddin lwn. Yap Chai Seng.*

[2] Ketepatan keputusan dalam *Vethanayagam* bergantung pada jawapan kepada persoalan sama ada peruntukan-peruntukan dalam Bab X Bahagian III Akta Relief Spesifik 1950 (dalam yang mana terdapat seksyen-seksyen 52 hingga 55) terpakai kepada kedua-duanya injunksi-injunksi interlokutori dan berkekalan. Keputusan-keputusan dalam kedua-duanya *Tan Suan Choo lwn. Majlis Perbandaran Pulau Pinang* dan *Bina Satu Sdn. Bhd. lwn Tan Construction* memberi jawapan yang negatif. Kedua-duanya *Tan Soon Choo* dan *Bina Satu* menyatakan undang-undang dengan betulnya. Iannya dengan itu menunjukkan bahawa *Vethanayagam*, sejauhmana ianya bercanggahan dengan kedua-dua autoriti tersebut, adalah tidak baik di sisi undang-undang dan tidak seharusnya diikuti.

[3] Seorang Hakim yang mendangar sesuatu permohonan untuk satu injuksi interlokutori seharunya menjalankan siasatan menurut garis panduan yang berikut:-

(a) pertamanya, beliau mestilah menanyakan dirinya sendiri sama ada keseluruhan fakta-fakta yang digunakan di hadapannya mendedahkan suatu isu serius *bona fide* untuk dibicarakan;

(b) setelah mendapati bahawa suatu isu telah didedahkan yang memerlukan penyiasatan yang selanjutnya, beliau mestilah menimbangkan di mana terdapatnya keadilan kes tersebut. Dalam membuat taksirannya, beliau mestilah mengambil kira kesemua perkara-perkara yang relevan, termasuk hakikat praktikal kes tersebut;

(c) Hakim mestilah mempunyai dalam pemikirannya bahwa remedi yang beliau diminta untuk mentadbirkan adalah bebas untuk dipertimbangkan, bertujuan untuk menghasilkan keputusan yang adil bagi tempoh antara tarikh permohonan dan perbicaraan sebenarnya dan bertujuan untuk mengekalkan *status quo*.

[4] Dalam kes semasa ini, persoalan menggantikan kompartmen 549 bagi 408 bukannya dan tentunya tidak berada dalam hajat pihak-pihak tersebut apabila mereka memasuki perjanjian tersebut. Pada ketika itu, pihak-pihak yang berkontrak tentunya meneruskan atas dasar bahawa kompartmen 408 terdapat dalam keadaan semulajadinya untuk ditebang.

Masalah kompartmen 408 timbul selepas perjanjian tersebut dilaksanakan. Bahawa pihak-pihak seharusnya menentukan peristiwa yang tidak disangka terdahulu daripadanya adalah satu *non sequitur*.

[5] Keputusan oleh Tuan Hakim yang bijaksana bahawa plaintif tidak boleh menuntut apa-apa relief terhadap defendan-defendan kedua dan ketiga secara keseluruhannya tidak mengendahkan kes plaintif berhubung dengan perkara ini iaitu bahawa defendan-defendan ini adalah sebenarnya *alter ego* defendan pertama. Plaintif telah mengemukakan keterangan yang mencukupi di peringkat interlokutori untuk menimbulkan satu inferens bahawa defendan kedua dan ketiga tidak melaksanakan penghakiman bebas mereka tetapi hanyalah merupakan boneka yang dikawal oleh defendan pertama dalam kesemua perkara berhubung dengan perniagaan dan hal-ehwal firma tersebut.

[6] Mengenai keterangan di hadapannya Tuan Hakim yang bijaksana sepatutnya telah memutuskan bahawa penegasan plaintif bahawa defendan-defendan kedua dan ketiga adalah merupakan *alter ego* defendan pertama mewajarkan siasatan yang selanjutnya di perbicaraan dan atas alasan tersebut membawa kepada persoalan yang serius untuk dibicarakan. Untuk tidak menghiraukan penghujahan yang serius berdasarkan keterangan yang sememangnya bukan mustahil atau sememangnya tidak tak munasabah adalah satu salah-arahan yang serius. Dalam keadaan yang sedemikian Tuan Hakim yang bijaksana telah tersalah-arah dirinya sendiri dalam menolak keluar satu kes yang berasaskan pada keterangan *prima facie* yang telah menyokong aspek ini dalam kes plaintif tersebut.

[7] Kesimpulan Tuan Hakim yang bijaksana bahawa perjanjian tersebut tidak boleh dikuatkuasakan terhadap defendan-defendan kedua dan ketiga kerana mereka bukannya pihak kepada perjanjian itu menghindarkan sepenuhnya peruntukan s. 26(b) Akta Relief Spesifik 1950. Kesan seksyen itu adalah bahawa beban tersebut bergantung ke atas orang yang yang mendakwa bahawa beliau menerima kepentingan tanpa mengetahui tentang kontrak terdahulu.

[8] Sementara Tuan Hakim yang bijaksana adalah tidak berkewajipan untuk membuat satu keputusan yang positif bahawa defendan-defendan kedua dan ketiga telah atau telah tidak melepaskan bebanan itu, beliau seharusnya, namun demikian, memutuskan bahawa ini adalah satu perkara untuk diselesaikan diperbicaraan dan bukannya hanya mengenepikannya. Sama ada penegasan defendan-defendan kedua dan ketiga, bahawa mereka adalah ejen-ejen bebas yang melaksanakan penghakiman mereka sendiri yang bebas daripada apa-apa kawalan oleh defendan pertama, adalah benar, adalah satu perkara yang harus ditentukan selepas keterangan mereka diperiksa-balas. Penyelesaian terus oleh Tuan Hakim mengenai isu yang sebegitu penting adalah satu salah laksana keadilan.

[9] Keputusan Tuan Hakim yang bijaksana bahawa perjanjian tersebut adalah tak sah di sisi undang-undang dan dengan itu tidak terdapat persoalan yang serius untuk dibicarakan adalah jelas bertentangan dengan pengumuman dalam kes-kes *Mohamed Zainuddin* dan *SiRusa*, dimana kes yang terkemudian merupakan satu autoriti yang secara jelasnya mengikatnya. Keesahan perjanjian tersebut adalah satu persoalan serius yang memerlukan pertimbangan yang matang di perbicaraan tindakan tersebut dan seharusnya tidak patut diputuskan secara terperinci di peringkat interlokutori sepertimana yang telah dilakukan oleh Tuan Hakim yang bijaksana.

[10] Mahkamah tidak dapat bersetuju dengan penghujahan Peguam yang bijaksana bagi defendan kedua dan ketiga bahawa sama ada terdapatnya persoalan yang serius untuk dibicarakan bergantung kepada budibicara Hakim bijaksana dan tidak sepatunya diusik dalam sesuatu rayuan. Soalan samada terdapat persoalan yang serius untuk dibicarakan bergantung

kepada tanggapan objektif fakta-fakta yang dikemukakan kepada pengantara kehakiman dan tidak terdapat unsur budibicara dalam penilaian objektif fakta-fakta itu.

[11] Sementara ianya benar bahawa Tuan Hakim yang bijaksana adalah betul dalam mengambil kira hakikat pratikal kedudukan tersebut, antara yang mana adalah fakta bahawa pekerja-pekerja akan diberhentikan dan risiko bahawa konsesi tersebut akan kehilangan melalui keluputan masa beliau tidak walaubagaimanapun menimbangkan hal ini dengan secukupnya dengan pertimbangan-pertimbangan lain yang lebih relevan dan menandingi pertimbangan-pertimbangan yang banyak menyebelahi injunksi diteruskan sehingga perbicaraan tindakan tersebut.

[12] Atas penegasan bahawa gantirugi merupakan satu remedi yang mencukupi, Tuan Hakim yang bijaksana, dalam gagal mempertimbangkan peruntukan-peruntukan s. 19 Akta Relief Spesifik 1950 dan kemungkinan pemakaiannya kepada fakta-fakta di hadapan beliau, telah gagal mengambilkira satu pertimbangan yang penting. Tuan Hakim yang bijaksana, dalam bergantung sepenuhnya pada Fasal 14 perjanjian tersebut, untuk melaksanakan budibicaranya, telah mengambilkira satu pertimbangan yang tak relevan.

Per: Siti Norma Yaakob, HMR:

[1] *Ex-parte* injuksi interim telah dipohon dan diperolehi oleh perayu pada 11 Ogos 1994. Tuan Hakim yang bijaksana atas satu permohonan *inter parte*, telah membubarkan injunksi interim tersebut pada 23 Ogos 1994. Dengan itu perbicaraan permohonan *inter parte* tersebut telah diadakan dan penghakiman Tuan Hakim yang bijaksana telah dibuat dalam tempoh 2 minggu yang ditetapkan oleh A. 29 k. 1 (2B) Kaedah-kaedah Mahkamah Tinggi 1980.

[2] Perbicaraan-perbicaraan pada 22 dan 23 Ogos 1994, walaupun bersifat interlokutori, adalah perbicaraan-perbicaraan *inter parte* atas merit permohonan tersebut sama ada injunksi interim harus terus dikekalkan sehingga perbicaraan tindakan utama itu sendiri atau seharusnya dibubarkan atas permintaan responden. Oleh yang demikian, tidak terdapat dasar bagi perayu memohon kepada Tuan Hakim yang bijaksana untuk menghidupkan semula injunksi interim tersebut.

[3] Injunksi interim tidak luput secara automatik pada penghujung tempoh 2 minggu tetapi telah dibubarkan oleh satu Perintah Mahkamah yang telah dibuat dalam tempoh dua minggu dari pemberiannya. Perintah Mahkamah tersebut adalah satu perintah yang boleh dirayu dan Mahkamah ini diberi kuasa dengan bidangkuasa yang perlu di bawah s. 67(1) Akta Mahkamah-Mahkamah Kehakiman 1964 untuk menguruskannya.

[Rayuan dibenarkan dengan kos. Injunksi interim perayu telah dikekalkan sehingga perbicaraan tindakan tersebut]

Cases referred to:
Mohamed Zainuddin v. Yap Chai Seng [1978] 1 MLJ 40 ***(foll)***
Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte. Ltd. [1985] 1 MLJ 132 ***(foll)***
Vethanayagam v. Karuppiah & Ors. [1968] 1 MLJ 283 ***(not foll)***
Victorian Egg Marketing Board v. Parkwood Eggs Pty Ltd. [1978] 20 ALR 129 ***(foll)***
American Cynamid v. Ethicon Ltd. [1975] AC 396 ***(refd)***
Tien Ik Sdn Bhd. & Ors. v. Kuok Khoon Hwong Peter [1992] 2 MLJ 689 ***(refd)***
Bhuy Narain Singh v. Gokul Chand Mahton L.R. 61 1A 115 ***(refd)***
Ong Chat Pang v. Valliappa Chettiar [1971] 1 MLJ 224 ***(refd)***
Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 ***(foll)***
Toronto Corporation v. Toronto Rly. [1907] AC 315 ***(refd)***

Bina Satu Sdn. Bhd. v. Tan Construction [1988] 3 MLJ 533 ***(foll)***
Cheng Hang Guan v. Perumahan Farlim (Penang) Sdn. Bhd. [1988] 3 MLJ 90 ***(dist)***
Garden Cottage Foods Ltd. v. Milk Marketing Board [1984] AC 130 ***(refd)***
Jones v. Lipman [1962] 1 WLR 832 ***(refd)***
Tan Bin Hock v. Abu Samah [1968] 1 MLJ 22 ***(dist)***
Lo Su Tsoon v. Sourthern Estate [1971] 2 MLJ 161 ***(refd)***
Sundang Timber v. Kinabantangan Development [1977] 2 MLJ 161 ***(refd)***
Hashim bin Adam v. Daya Utama Sdn. Bhd. [1980] 1 MLJ 125 ***(refd)***
Syarikat Seri Padu Sdn. Bhd. v. Intan Enterprises Company [1982] 2 MLJ 17 ***(refd)***
Bissessar Das v. Emmanuel Vas LR 55 I.A 58 ***(refd)***
Zaibun Sa v. Loh Koon Moy [1982] 2 MLJ 92 ***(refd)***

Legislation referred to:
Specific Relief Act 1950, ss. 20(l)(g), 26(b), 51, 54 (d)(f)
Societies Act 1966, s. 12(3)
Rules of the High Court 1980, O. 29, r. 1 (2B)
Courts of Judicature Act 1964, ss. 44, 67(1)

For the appellant - Cyrus Das (Steven Thiru with him); M/s Anthony, Pereira & Ten
For the 1st respondent - Mokhtar bin Ngah; M/s. Mokhtar bin Ngah & Co.
For the 2nd and 3rd respondents - Chan Kok Keong (Chew Kok Lian with him); M/s Teo & Chew

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal against the decision of the High Court setting aside an injunction obtained *ex-parte* by the appellant (the plaintiff in the Court below) against the respondents (defendants in the Court below). For convenience, the parties will, throughout this judgment, be referred to as plaintiff and defendant. The injunction obtained by the plaintiff enjoined the defendants and their agents from, *inter alia,* entering the parcel of a timber concession known as Block 549 or from giving any effect to any agreement, apart from the agreement with the plaintiff to sell him the timber logs harvested from the said parcel. On 28 November 1994, the plaintiff moved this Court on an urgent basis for an interim injunction in terms of the order that was discharged to secure the *status quo* pending the disposal of the appeal. After having heard argument we allowed the plaintiff's application, exercising the powers conferred on us by s. 44 of the Courts of Judicature Act, 1964. In view of the urgency of the matter, there being an imposition of a temporary restraint upon the defendants and the interest of the State Government as issuing authority being indirectly involved, we directed that the appeal proper be heard on 12 December 1994. Accordingly, the appeal came up before us on that date. After hearing submissions of Counsel we allowed the appeal, indicating that we would give our reasons for the decision we handed down and this we now do.

The brief facts relevant to this appeal are these. On 9 October 1990 the State Government of Trengganu wrote a letter to Kilang Perkayuan Hj. Mohd Noor ("the firm"). In it they offered to the firm a licence to enter upon and harvest timber from two parcels of a concession measuring an area of about 1000 acres and demarcated as compartments 408 and 412 respectively. The offer was accepted. As at the date of that letter the 1st defendant was the sole proprietor of the firm. On 13 January 1991, before any licence was issued, the firm (in effect the 1st defendant) entered into a written agreement ("the Agreement") with the plaintiff under the terms of which it sold to the plaintiff all the timber located on the two parcels. By a letter dated 28 January 1991, the State Authority

wrote to the firm calling for the payment of the premium and other dues. The sums called for having been settled, the State Authority issued the licence firstly in respect of compartment 412 in respect of which no dispute arises. Large sums of money were paid by the plaintiff to the 1st defendant, some of which were, according to the plaintiff's affidavit evidence, in advance of the due dates for payment, including the premiums due to the State in respect of both parcels. In response to a question by the Court, Encik Das, who appeared for the plaintiff before us (but who was not Counsel in the Court below) said that the plaintiff had paid the firm RM870,000. The plaintiff began to harvest timber from compartment 412 using the services of a Mr. Ng Kim Vooy of Zaman Enterprise and as we have said, without there being any dispute. Whose agent Mr. Ng was in the whole transaction is the subject of some controversy. When the plaintiff came to harvest timber from compartment 408, he discovered that that parcel had been subjected to logging by neighbouring loggers. The compartment had been left in a state in which it did not accord with the terms or the description accorded it in the original grant in the licence. It is the plaintiff's case that, at this stage, an arrangement was arrived at whereby the firm was to apply for a parcel to replace compartment 408. This was done and the State issued a new licence to the firm in respect of a new parcel designated as compartment 549 which is the subject of the present litigation. In its letter dated 18 October 1993, approving the replacement, the State made it clear that all moneys paid to it under the previous grant would be taken into account in reckoning the premium for the new parcel. Because of the emphasis placed by Counsel on the contents of that letter, we reproduce it below:

Jabatan Perhutanan Negeri
Terengganu

Ruj kami: (56)dlm P.H.N.T. 400/7/1/419
Tarikh: 18 Oktober 1993

Pengurus,
Kilang Perkayuan Haji Mohd. Noor
No. 500, Jalan Butut
21700 Kuala Berang.

Tuan,

Permohonan Mengganti Sebahagian Kawasan Perjanjian Dalam Sub-Blok 2 di Kawasan Sempadan Terengganu/Kelantan Oleh Kilang Perkayuan Haji Mohd Noor.

Dengan segala hormatnya merujuk kepada perkara di atas, sukacita dimaklumkan bahawa Kerajaan Negeri telah bersetuju meluluskan sebagai kawasan ganti sub-blok 2 seluas 197.10 hektar sahaja dalam sebahagian kompatmen 549, Hutan Simpan Tembat seperti bertanda merah pada pelan yang disertakan bersama. Oleh yang demikian, kelulusan kawasan membalak dalam sub-blok 2 bagi blok 3 seluas 197.10 hektar seperti surat pejabat ini Bil. (2) dalam siri yang sama bertarikh 28 Januari 1991 adalah dibatalkan.

2. Sementara itu, Kerajaan Negeri juga bersetuju meluluskan tempoh perjanjian dilanjutkan selama satu tahun lagi mulai 12 Januari 1993 kepada 1 Januari 1994 bagi membolehkan kawasan ganti tersebut diusahasilkan. Lain-lain syarat kelulusan adalah seperti surat pejabat ini Bil. (175) dim. PHNT. 547(S) bertarikh 9 Oktober 1990.

3. Oleh kerana pihak tuan telah menjelaskan bayaran tersebut seperti rujukan surat Bil (2) dlm. PHDTB. 4/7/1/118 bertarikh 4 Mac 1992 bagi sub-blok 2 yang telah dibatalkan tersebut maka pejabat ini tiada halangan segala bayaran yang telah dibuat dipindahkan untuk

kawasan yang diluluskan ganti tersebut. Untuk proses pelesenan selanjutnya, pihak tuan diminta berhubung dengan Pegawai Hutan Daerah, Terengganu Barat, Kuala Berang.

Sekian dimaklumkan, terima kasih.

Berkhidmat Untuk Negara

Saya yang menurut perintah,

Sgd.

(Mohd Yussof bin Baharom)

b.p. Pengarah Perhutanan Negeri, Terengganu.

Three events of some importance require mention. The first is the bankruptcy of the 1st defendant that occurred on 21 January 1993. The receiving and adjudication orders made against the 1st defendant were, however, set aside on 10 July 1994. The second event is the entry of the 2nd and 3rd defendants into the firm as partners on 19 October 1993. They are the wife and son respectively of the 1st defendant. The third is the withdrawal of the 1st defendant from the firm on the same date, i.e., 19 October 1993. Once the new licence in respect of compartment 549 had been issued, the firm proceeded to act as if the Agreement did not exist. In fact, the 1st defendant went so far as to suggest in a letter dated 15 July 1994 written by him to the plaintiff's brother (who, on the affidavit evidence on record, acted as the plaintiff's agent) that the entire transaction was a loan. The plaintiff then took out a writ against the defendants and obtained the injunction adverted to earlier in this judgment. An application to set aside that injunction was acceded to by the learned Judge and it is against that order that the present appeal has been brought.

In the judgment appealed against, the learned Judge has advanced five grounds for dissolving the injunction. First, he found that it was not within the contemplation of the parties that compartment 549 should form part of the transaction between the parties as recorded in the Agreement and for that reason the plaintiff could claim no rights in respect of it. Secondly, he found that the plaintiff had no *locus standi* to sue the 2nd and 3rd defendants because they were not parties to the Agreement. Thirdly, he held that the Agreement was illegal and that consequently there was no serious question to be tried. The fourth ground advanced by the learned Judge is that the balance of convenience lay in favour of the defendants. Lastly, the learned Judge held that damages are an adequate remedy, the parties having provided for it in clause 14 of the Agreement.

We propose to deal with each of the reasons which the learned Judge has advanced for setting aside the injunction but before we do so we consider it desirable, in view of the approach taken by the learned Judge, to review some of the authorities on the subject and to restate the relevant principles that apply to a case such as the present.

We begin by respectfully accepting that the correct approach to be adopted and the stages of reasoning involved in the process of arriving at the conclusion as to whether interlocutory injunctive relief should be granted or withheld are those that have been neatly summarised by Hashim Yeop A. Sani J., (as he then was) in *Mohamed Zainuddin v. Yap Chai Seng* [1978] 1 MLJ 40. This is what that very eminent Judge said in that case (at page 42):

> Firstly to discover whether the plaintiffs case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the Court to take into account any tipping in the balance

as revealed by affidavits... Secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The Judge then considers the balance of convenience, and if the relevant factors were evenly balanced the Court should grant an interlocutory injunction which would maintain the *status quo*. **It is said that at that stage the Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.** (The emphasis is ours.)

In *Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte. Ltd.* [1985] 1 MLJ 132 the plaintiff and defendant entered into an agreement under which the plaintiff was to manage the defendant's hotel for a period of ten years. Disputes having arisen, the plaintiff obtained an *ex-parte* interim injunction restraining the defendant from interfering with the plaintiffs running of the defendant hotel. An application to set aside that injunction having been refused, the defendant appealed to the Federal Court. On appeal it was argued that the agreement in question being for a period longer than three years, it could not be specifically enforced. Reliance was placed on s. 20(l)(g) of the Specific Relief Act which provides as follows:

20 (1)The following contracts cannot be specifically enforced:

...

(g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

Counsel for the defendant then submitted that by reason of s. 54(f) of the Specific Relief Act, no injunction (meaning a permanent injunction) could be granted to prevent the breach of a contract not specifically enforceable. It was then argued, relying on the decision in *Vethanayagam v. Karuppiah & Ors*. [1968] 1 MLJ 283, that an interim injunction cannot be granted if a permanent injunction did not lie.

These arguments, which appeared to provide a complete answer to the plaintiff's claim on merits, were rejected by the Federal Court.

Abdul Hamid CJ (Malaya), as he then was, delivering the judgment of the Court said (at page 135):

While we appreciate that these questions are crucial, indeed, they are the main grounds upon which the appellant's case rests, we do not, however, see the necessity at that stage for the learned Judge to decide on these difficult points of law.

Suffice for the learned Judge to decide, and this he did, that there are serious questions that have arisen for trial. While we agree that there are serious questions of law we are also of the view that these questions are relevant for consideration in determining the grant or otherwise of an interim injunction but the question is should it be the Court's business to resolve these serious and difficult questions of law at that stage of the litigation? We think not.

In *Victorian Egg Marketing Board v. Parkwood Eggs Pty Ltd.* [1978] 20 ALR 129, after referring (at page 145) to *American Cynamid v. Ethicon Ltd.* [1975] AC 396, the *locus classicus* on the subject, Brennan J., (sitting in the General Division of the Federal Court of Australia) laid down the following test (at page 146) with which, subject to the qualification we shall express in a moment, we respectfully agree:

The strength of the evidentiary aspect of the case is determined in the light of the opportunity to secure and to present in the proceedings before the primary Judge evidence to support the *prima facie* case: *De Mestre v. A.D. Hunter Pty Ltd.* [1952] 77 W N (NSW)

143 at 145. Though the applicant's evidence be sketchy and likely to be insufficient if standing alone to establish the applicant's case at the final hearing, yet the circumstances in which the application is heard may show that the evidentiary strength of the applicant's case is substantial and that his case has a fair chance of success. **If the applicant's entitlement to relief depends upon his making good a proposition of law, the Judge does not decide whether the proposition be right or wrong, but only whether the prosposition is sufficiently arguable to show that the applicant has a fair chance of success at the hearing.** (Emphasis supplied)

The qualification that we make in accepting the principle contained in the passage cited is in respect of the reference therein to the requirement that an applicant for interlocutory injunctive relief has to establish a *prima facie* case, an approach which our Courts have abandoned after *American Cynamid (supra).*

Our attention has been drawn to the more recent decision of the Supreme Court in *Tien Ik Sdn Bhd. & Ors. v. Kuok Khoon Hwong Peter* [1992] 2 MLJ 689. Jemuri Serjan CJ (Borneo), there observed that a Judge hearing an application for an interim injunction should not, in his judgment, give the impression that he had in fact disposed off the main action on its merits. Although his Lordship's remarks in that case were made in the context of a proceeding commenced by an originating summons, they are of universal application.

There remains one matter of importance that we need to address. It has to do with the correctness of the proposition of law established by *Vethanayagam v. Karuppiah (supra)* which is in conflict with authorities decided after it. To recapitulate, that case is authority for the proposition that an applicant will not be entitled to an interlocutory injunction in circumstances where a final injunction cannot be granted.

Now, *Vethanayagam* was a case in which the plaintiff, a member of a registered society, brought an action challenging the election of the defendants as office bearers to a branch of the society. The society had failed to apply timeously to the Registrar of Societies for the approval of the branch. The result was that under s. 12(3) of the Societies Act 1966, the branch was illegal. The plaintiff then moved for an interlocutory injunction to restrain the defendants from acting contrary to the constitution of the society. The illegality point was raised by the plaintiff himself at the hearing of his application. In refusing interlocutory relief, Raja Azlan Shah J., (as he then was), said:

To my mind, this motion can be determined on the narrow ground whether it is just and proper to grant a temporary injunction at the suit of a member of an unlawful society to restrain other members of that society from doing acts contrary to the rules of the constitution of the Congress.

Jurisdiction to grant a temporary injunction is always a matter of discretion which is to be exercised in accordance with well-known principles. An order for a temporary injunction can be sought only in aid of a prospective order for a perpetual injunction. If, therefore, in the event of the plaintiff's success, he cannot obtain a decree for perpetual injunction, it is not competent for him to ask for a temporary injunction (see *Bishun Prashad v. Sashi Bhusan* AIR 1923 Pat.133). **In other words, a temporary injunction will not be granted in cases where a permanent injunction is not available under ss. 52 to 54 of the Specific Relief (Malay States) Ordinance, 1950**. Section 54(f) enacts that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. This means that a Court will not grant an injunction to prevent the breach of a contract if the contract be such as cannot be specifically enforced under the provisions of Chapter II of the Ordinance, for example s. 20(b). The grant of injunction therefore is always guided by the same principles as the grant of specific performance of a contract, and if the

contract is such as not to be capable of being, specifically enforced, no injunction can be granted to prevent its breach. (Emphasis supplied.)

The plaintiff appealed. The Federal Court (whose judgment was delivered by Suffian F.J., as he then was) dismissed the appeal but for different reasons: reasons not relevant for present purposes. Their judgment is to be found in [1969] 1 MLJ 146. Since the route their Lordships took to arrive at their conclusion did not necessitate any discussion as to the correctness of the reasoning applied by the Judge at first instance, their affirmation of his ultimate decision cannot in our view be regarded as an acceptance of the principles applied by him. But we must say at once, in all fairness to that very learned Judge, that the Federal Court neither made any adverse comment on the approach adopted by him nor of the principles that he applied in coming to his decision. Indeed we would go so far as to say that the Federal Court itself followed closely the jurisprudence applied by Raja Azlan Shah J. for refusing interlocutory relief.

The correctness of the decision in *Vethanayagam* depends, in our judgment, upon the answer to one crucial question. It is this. Do the provisions of Chapter X of Part III of the Specific Relief Act, 1950 (within which fall ss. 52 to 55) apply to both interlocutory and perpetual injunctions? In *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, Edgar Joseph Jr. J. (now FCJ), answered that question in the negative. His Lordship in that case held that the statutory bar encapsulated in s. 54 (d) of the Act is confined to perpetual or final injunctions and has no application to temporary injunctions which are governed by s. 51 of the Act. The judicial reasoning in *Tan Suan Choo* (*supra*) is faultless and the interpretative process applied there has the support of respectable and high authority. Headings, unlike marginal notes, are permissible guides to the interpretation of statutes: *Toronto Corporation v. Toronto Rly.* [1907] AC 315. The decision in *Tan Suan Choo* was followed V.C. George J., (as he then was) in *Bina Satu Sdn. Bhd. v. Tan Construction* [1988] 3 MLJ 533. Although *Tan Suan Choo* and *Bina Satu* appear to be in conflict with the decision of the Supreme Court in *Penang Han Chiang School v. National Union of Teachers* [1988] 1 MLJ 302, the approach adopted in both the former and the authorities supporting that approach were never considered by the Supreme Court in *Penang Han Chiang.* As such, we are not persuaded that the latter overruled both the former *sub silentio,* more so when neither were referred to in the judgment of the Supreme Court. We are of the view that the decision in *Penang Han Chiang* may well have been different if the attention of the Supreme Court had been drawn to the judgments in *Tan Suan Choo* and *Bina Satu.*

In our considered opinion, both *Tan Suan Choo* and *Bina Satu* correctly state the law. It therefore follows that *Vethanayagam* (*supra*) in so far it conflicts with these two authorities is bad law and should no longer be followed. We are fortified in the view that we have taken by the fact that the Federal Court in *Si Rusa (supra)* declined to follow and apply *Vethanayagam* and by the approach laid down in *Tien Ik (supra).*

To summarise, a Judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:-

first, he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon

a consideration of all the relevant material before him, including submissions of Counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the Judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan v. Perumahan Farlim (Penang) Sdn. Bhd.* [1988] 3 MLJ 90). Apart from such cases, the Judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;

thirdly, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan* (*supra*). It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A Judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

It is with these matters in mind that we now return to the case at hand and examine the reasons given by the learned Judge for setting aside the injunction.

It is convenient to deal with the first and second grounds together. This is what the learned Judge said in relation to these:

> It may be noted that there is no saving provision in the agreement permitting plaintiff to log in forest compartment 549. To put simply, it was not within contemplation of the parties that compartment 549 was to form part of the agreement. So, even if the defendant 1 was a partner of Syarikat, the agreement does not afford a ground for the plaintiff to log in forest compartment 549.
>
> In the case of defendant 2 and 3, the plaintiff has no *locus standi* to bring this suit against them as they are not parties to the agreement [*Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12].

In our judgment these passages overlook certain vital aspects of the case. In the first place, the question of substituting compartment 549 for 408 was not and could not have been within the contemplation of the parties when they entered into the Agreement. At that point in time, the contracting parties must have proceeded on the basis that compartment 408 was available in its original state to be harvested. The problem about compartment 408 arose much after the Agreement had proceeded to implementation. That parties should stipulate for an unforeseen event in advance of it is a *non sequitur*.

The finding by the learned Judge that the plaintiff can claim no relief against the 2nd and 3rd defendants completely overlooks the plaintiff's case on this point, namely, that these defendants are truly the *alter ego* of the 1st defendant. The plaintiff had produced sufficient evidence at the interlocutory stage to raise an inference that the 2nd and 3rd defendants were not exercising their independent judgment but were merely puppets controlled by the 1st defendant in all matters concerning the business and affairs of the firm. That is all that was required of the plaintiff at this the interlocutory level. Any finding made by the Judge on this aspect of the case would not have been final. It would have been a preliminary view which is subject to change at the trial after he has heard all the evidence, including any evidence given by the defendants, displacing *the prima facie* view formed at the interlocutory stage. On the evidence before him the learned Judge should have held that the allegations were not baseless and constituted a serious question to be tried. Indeed, we are satisfied that the learned Judge erred in failing to give any consideration at all to this aspect of the case. To ignore a serious submission based on evidence that is not inherently incredible or inherently improbable is a serious misdirection. In our judgment, the learned Judge ought to have held that the plaintiff's contention that the 2nd and 3rd defendants were the *alter ego* of the 1st defendant merited further investigation at the trial and for that reason amounted to a serious question to be tried. He misdirected himself in dismissing out of hand a case mounted on *prima facie* evidence that supported this aspect of the plaintiff s case.

The conclusion of the learned Judge that the Agreement was not enforceable against the 2nd and 3rd defendants because they were not parties to it completely ignores the provisions of s. 26(b) of the Specific Relief Act, 1950 which was brought to his attention during argument. That section provides that:

> Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -
>
> (a) ...
>
> (b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a transferee for value, who has paid his money in good faith and without notice of the original contract.

The effect of that section is that the burden lies on him (in this case the 2nd and 3rd defendants) who asserts that he took the interest without notice of the prior contract. (See: *Bhuy Narain Singh v. Gokul Chand Mahton* L.R. 61 1A 115; *Ong Chat Pang v. Valliappa Chettiar* [1971] 1 MLJ 224). There was no duty on the learned Judge to make a positive finding that the 2nd and 3rd defendants had or had not discharged that burden. Indeed he was prohibited from expressing any concluded view on the matter. But he should have held that this was a matter to be resolved at the trial instead of brushing it aside. The learned Judge should have properly addressed his mind to the attempt by the defendants

to escape liability by claiming that they were not parties to the Agreement and for that reason alone they were not bound by it. Their assertion, in the light of the compelling *prima facie* evidence that was laid before the Court sounds as hollow as the not dissimilar response given by the unsuccessful defendant in *Jones v. Lipman* [1962] 1 WLR 832. We are not for one moment suggesting at this stage that the 2nd and 3rd defendants were not independent agents, exercising their own judgment free from any control by the 1st defendant. That they may well be. However, whether their assertion on the point or that made by the plaintiff is the truth is a matter that has to be determined after their evidence has been tested by cross-examination. The summary disposal by the Judge of an issue of such importance is, in our view, a serious miscarriage of justice.

We now turn to the third reason given by the learned Judge. The learned Judge's finding that the Agreement was illegal and that there was therefore no serious question to be tried is clearly contrary to the pronouncements in *Mohamed Zainuddin* (*supra*) and *Si Rusa* (*supra*), the latter being an authority plainly binding on him. The entry by the learned Judge upon a question that was exclusively within the province of the trial Judge was clearly wrong. Further, the inquiry as to whether there was a serious question to be tried is one that ought to have been addressed at the outset and not by-the-way as a secondary issue. It appears that the correct approach as laid down by several leading authorities was not followed in this case.

The learned Judge in concluding that the Agreement is illegal relied on *Tan Bin Hock v. Abu Samah* [1968] 1 MLJ 22. However, Encik Das submitted that his case did not come within the category of cases of which *Tan Bing Hock* (*supra*) is one. Others in that category include *Lo Su Tsoon v. Sourthern Estate* [1971] 2 MLJ 161, *Sundang Timber v. Kinabantangan Development* [1977] 2 MLJ 161 and *Hashim bin Adam v. Daya Utama Sdn. Bhd*. [1980] 1 MLJ 125. He drew our attention to the decision of a strongly constituted Federal Court in *Syarikat Seri Padu Sdn. Bhd. v. Intan Enterprises Company* [1982] 2 MLJ 17 which he submits is much akin to the facts of his case. Counsel also submitted that the learned Judge misapprehended the true nature of the Agreement by treating it as an assignment of rights when it was, according to its language, nothing more than a sale of the timber standing on the land in question. Counsel then argued that this was an issue on which detailed argument and mature consideration was necessary. In response, Encik Chan Kok Keong who appeared for the 2nd and 3rd defendants before us, but not in the Court below, and to whom Encik Mokhtar deferred, submitted that whether there was a serious question to be tried was a matter within the discretion of the learned Judge and ought therefore not to be readily interfered with on appeal.

We are of the view that Encik Das is right in the submissions that he made. For our part, we hold that the legality of the Agreement and the other issues which we have adverted to earlier in this judgment, are all serious questions requiring mature consideration and should not have been gone into in detail at the interlocutory stage as was done by the learned Judge. The answer to Encik Chan's submission is contained in the proposition that was put to him in the course of his address to us. It is this. The question as to whether there is disclosed a serious issue to be tried depends, not as he contended, upon the discretion of the Judge, but upon an objective perception of the facts presented to a judicial arbiter. In our judgment, no element of discretion is involved in the evaluation of those objective facts. Accordingly, we have no hesitation in dissenting from the submission made by Encik Chan. In our view, the learned Judge clearly went beyond the parameters fixed by binding precedent.

The fourth and fifth reasons may be taken together. And this is how the learned Judge put them:

> As argued by Encik Teo Poh Oon, if injunction is not lifted, no logging activity could be carried out in compartment 549 and the sawmill of Syarikat *(sic)* becomes inoperational. Workers had to be laid off. Further, licence for to log in compartment 549 would expire by efflux *(sic)* of time. As such, I hold, the balance of convenience favour the defendants.
>
> Under clause 14 of the agreement, the parties had contemplated payment of appropriate damages in the event of breach by defendant 1. On the facts I hold that damages would be an adequate remedy.

It is apparent from these passages that the learned Judge proceeded upon the erroneous assumption that the adequacy of damages in lieu of an injunction is a matter to be treated separately from the balance of convenience. All matters that guide a Court of Equity in determining where the justice of the case lies are compendiously called "the balance of convenience" and we have, earlier in this judgment, made reference to some of those matters.

While we agree that the learned Judge was correct in taking into account the practical realities of the situation, among which is the fact that workers would be laid-off and the risk that the concession would be lost through effluxion of time, we are of the view that he did not sufficiently balance these with other relevant and competing considerations that weighed heavily in favour of the injunction being continued until the trial of the action. There was no evidence before the learned Judge of the difficulties adverted to by him in relation to the workers in the sawmill. In any event this difficulty was caused, not by anything that the plaintiff did, but by the defendants throwing overboard the obligations they were bound to honour. We also note that there was no suggestion that there was an irrevocable arrangement *ab initio* that the firm's sawmill was to exclusively mill only the logs harvested from the concession in question. The consideration that the licence may lapse by effluxion of time is sufficiently met by an order for early trial, and, depending on the urgency of the matter, a very early date for the disposal of the suit could have been be fixed by the learned Judge.

We next turn to clause 14 of the Agreement on which the Judge relied. All that clause says is that in the event of a termination of the Agreement by the firm, it shall pay to the plaintiff agreed compensation amounting to twice the value of the timber sold. The clause also reserves to the plaintiff the right to take any action he deems fit. Quite apart from the proper construction that is to be placed on the clause, which is not a matter to be dealt with on a summons to dissolve an injunction, s. 19 of the Specific Relief Act (which has been completely overlooked by the Judge) provides the necessary *prima facie* answer. That section is in the following terms:

> 19. A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

The section has been considered in a number of cases, including *Bissessar Das v. Emmanuel Vas* LR 55 I.A 58 and *Zaibun Sa v. Loh Koon Moy* [1982] 2 MLJ 92**,** both decisions of the Privy Council.

Whether the section applies to the circumstances of this case is a matter that requires full argument and mature consideration. It is an issue that is manifestly unsuitable for full discussion when considering the grant or refusal of an injunction and for that reason we re-

frain from saying anything further upon it at this stage. What we do observe is that, by failing to consider the provisions of s. 19 and its possible application to the facts before him, the learned Judge in this case certainly failed to take into account an important consideration, and by placing reliance wholly on clause 14 of the Agreement in order to exercise his discretion, took into account an irrelevant consideration.

We have been reminded by Counsel on both sides that we are here addressing our minds to an appeal directed against the exercise of discretion by a Judge. As an appellate Court we have no initial discretion of our own to exercise. Our initial function is one of review only. But once it is demonstrated to a conviction, as has been done in this case, that the exercise of discretion by the Judge is plainly wrong in principle, that irrelevant considerations have been taken into account and that relevant considerations have been overlooked, we are seised of an independent discretion that falls to be exercised.

Having given the matter our utmost consideration we formed the view that, for the reasons given in this judgment, the decision of the learned Judge should not be permitted to stand. Accordingly, we allowed the appeal and restored, until the trial of the action, the injunction granted by the High Court on 11 August 1994 upon the undertaking as to damages incorporated in that order. The respondents were ordered to pay the costs of this appeal and the costs of the proceedings in the Court below to the appellant in any event. In the light of being advised by Counsel that the licence is to expire in July 1995, we also ordered that the action be tried by the High Court in January 1995. It was also ordered that the deposit paid by the appellant was to be refunded to him.

Siti Norma Yaakob JCA:

I have had the opportunity of reading the draft judgment of my brother Judge, Gopal Sri Ram, JCA, and I concur with all the reasons stated in the judgment in arriving at our decision on 12 December 1994.

However, there was one objection raised by Encik Chan Kok Keong, Counsel for the 2nd and 3rd respondents, which I consider needs to be replied, namely his contention that the procedure adopted by the appellant through this appeal to have the interim injunction which he, the appellant, had obtained *ex parte* on 11 August 1994, reinstated is wrong in law as by virtue of O. 29, rule 1 (2B), of the Rules of the High Court 1980, that interim injunction has since lapsed. Encik Chan contended further that the appellant should re-apply for the interim injunction and not proceed to appeal against the learned Judge's order dated 23 August 1994, when the interim injunction obtained *ex parte* was set aside following an application by the respondents to that effect.

Order 29, rule 1(2B), states as follows:

> Unless sooner revoked or set aside, an interim injunction obtained in an *ex parte* application shall automatically lapse at the end of two weeks from the date on which it is granted.

It would appear that in practice the life span of an interim injunction obtained *ex parte* is only for 2 weeks from the date of the grant and that any application by a dissatisfied party to have it revoked or set aside must be heard and determined by the Court before the expiry of the 2 weeks period.

In this appeal, the *ex parte* interim injunction was applied for and obtained by the appellant on 11 August 1994. The *inter parte* application to have it set aside was heard by the learned Judge on 22 and 23 August 1994, and on 23 August 1994, itself the learned Judge dissolved

the interim injunction. Thus the hearings of the *inter parte* application were held and the judgment of the learned Judge was made within the 2 weeks period stipulated by O. 29, r.1(2B).

The hearings on 22 and 23 August 1994, although interlocutory in nature, were hearings *inter parte* on the merits of the application as to whether the interim injunction should continue to be maintained until the hearing of the main action itself or should it be dissolved at the instance of the respondents. As such, there is no basis for the appellant to re-apply to the learned Judge for the reinstatement of the interim injunction. This is more so, as the interim injunction obtained *ex parte* on 11 August 1994, did not automatically lapse at the end of the 2 weeks period but that it was dissolved by an Order of Court made within 2 weeks of its grant. Moreover, that Order of Court is an appealable order and this Court is empowered with the necessary jurisdiction under s. 67(1) of the Courts of Judicature Act 1964, to deal with it.

Mr. Chan's contention would have carried some weight if the respondents had not applied to have the interim injunction set aside within the 2 weeks period. What then happens at the end of the 2 weeks? It would appear that under O. 29, r. 1 (2B), the interim injunction automatically lapses and since the order makes no provision for renewal, there is a need for the appellant to re-apply for the interim injunction. This situation did not arise in the appeal before us.

V.C. George JCA:

I have had the opportunity of reading the draft judgment of my brother Gopal Sri Ram, JCA and sister Siti Norma Yaakob, JCA in this matter which are in accord with my own reasons for the decision herein.